

# Morgan Lewis

**Tamar E. Finn**

**Patricia Cave**

tamar.finn@morganlewis.com

patricia.cave@morganlewis.com

July 2, 2019

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: WC Docket Nos. 18-141; 17-444; 16-143; 13-5; RM-10593 & 05-25  
Written Ex Parte Communication**

Dear Ms. Dortch:

Footnote 214 in the draft Memorandum Opinion and Order released on June 19, 2019, misconstrues the argument of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications (“TPx”). TPx did not intend to imply that the Competitive Market Test adopted by the Commission for Business Data Services (“BDS”) relied on competition enabled through unbundled network elements (“UNEs”).

Rather, TPx’s concern is that the Commission looked both to *actual* and potential competition to provide competitive pressure on deregulated BDS provided by price cap incumbent local exchange carriers (“incumbent LECs”).<sup>1</sup> In the *BDS Order*, the Commission recognized that “UNEs, where available, allow competitive providers to effectively compete in lower bandwidth services, and are particularly close substitutes for DS1s and DS3s.”<sup>2</sup> By forbearing from the incumbent LECs’ DS1 and DS3 unbundling obligations, the Commission is ending one form of actual competition that keeps BDS prices charged by incumbent LECs in check (*i.e.*, actual competition provided by competitive providers through the use of UNEs).

---

<sup>1</sup> *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, 3468, 3516, ¶¶ 17, 124 (2017) (“*BDS Order*”) (stating that the Commission looks to “specific market-based circumstances when considering actual and potential sources of competition;” and finding that refraining from ex ante price regulation “where we see active and likely medium-term competition developing is the most effective means of ensuring continued development of actual and robust competitive outcomes”).

<sup>2</sup> *BDS Order*, 32 FCC Rcd. at 3476, ¶ 32.

The Commission may be correct that “barriers to entry to supply transport are lower than for other types of BDS” because they “offer greater revenue opportunity than end user channel terminations.”<sup>3</sup> However, because small business, community-based organizations, local government, and other non-enterprise end user locations do not offer the same traffic aggregation opportunities, any loss of actual competition via UNEs is likely to harm those end user customers.

Regardless of the competitive market test established in the *BDS Order*, other Commission orders explicitly relied on Section 251 UNEs as a regulatory “backstop” to the potential negative consequences of granting forbearance. Most recently, the Commission relied on availability of UNEs when it granted incumbent LECs’ request for forbearance from “duplicative” Section 271 checklist obligations. The Commission expressed its expectations that: (1) “the substantive section 251 obligations will continue to be enforced” regarding the post-forbearance market;<sup>4</sup> (2) “competitive LECs will continue to have broad access to the LECs’ network facilities under a combination of options, including cost-based rates available under section 251 and through resale under section 251(b)(4);”<sup>5</sup> and (3) the Bell Operating Companies “must continue to comply with section 251 by providing UNE loops at cost-based rates” when required.<sup>6</sup> The Commission noted that, post-forbearance, competitors would “retain broad wholesale access options under section 251 unbundling, resale, and through commercial arrangements.”<sup>7</sup>

Before that, the Commission looked to other regulatory backstops in the *Enterprise Broadband Order* when it found that forbearance would “not affect ... competitors’ ability to obtain traditional DS1 and DS3 special access services or UNEs as inputs.”<sup>8</sup> The Commission noted that special access, “*in addition to section 251 UNEs*, remain available for use as wholesale inputs for [competitive providers’] enterprise broadband services.”<sup>9</sup>

---

<sup>3</sup> *Business Data Services in an Internet Protocol Environment, et al.*, Report and Order on Remand (WC Docket No. 16-143 *et al.*) and Memorandum Opinion and Order (WC Docket No. 18-141), FCCCIRC 1907-05, ¶ 32 (June 19, 2019) (“Draft UNE Transport Order”).

<sup>4</sup> *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd 6157, ¶ 18, n. 63 (2015) (“*2015 USTelecom Forbearance Order*”) (expecting that “competitors would seek to enforce section 251-related access obligations pursuant to cost-based or TELRIC standard, as opposed to the just and reasonable standard associated with checklist obligations”).

<sup>5</sup> *2015 USTelecom Forbearance Order*, 31 FCC Rcd at 6175-6176, ¶ 32.

<sup>6</sup> *2015 USTelecom Forbearance Order*, 31 FCC Rcd at 6172-73, ¶ 27.

<sup>7</sup> *2015 USTelecom Forbearance Order*, 31 FCC Rcd at 6173, ¶ 28.

<sup>8</sup> *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to its Broadband Services, Petition of BellSouth Corp. for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to its Broadband Service*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, 18718, ¶ 21, n. 90 (2007) (“*Enterprise Broadband Order*”).

<sup>9</sup> *Enterprise Broadband Order*, 22 FCC Rcd. at 18716-17, ¶ 20, n. 86.

Marlene H. Dortch, Secretary  
July 2, 2019  
Page 3

By contrast, special access now has been largely deregulated and UNEs remain the only regulatory backstop. Further, the Commission in the *Section 271 Broadband Forbearance Order* expressly found that partial forbearance was warranted, in part, “because competitive LECs can still obtain access to network elements under section 251 to serve business customers.”<sup>10</sup>

Sincerely,

/s/ Tamar E. Finn

Tamar E. Finn  
Patricia Cave

*Counsel to U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications*

cc: (Via E-Mail)  
Terri Natoli  
Edward Krachmer

---

<sup>10</sup> *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd. 21496, 21507, n. 68 (2004) (“*Section 271 Broadband Forbearance Order*”).